Supreme Court, U.S.
FILED
JUN 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1790

In The

# Supreme Court of the United States

October Term, 1989

AMY McCAIN, ET AL.,

*Petitioners,*

v.

HOUSTON INDEPENDENT SCHOOL DISTRICT, ET AL.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For the Fifth Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION

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June 13, 1990

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TO THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondents, Houston Independent School District, *et al.*, file this their Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioners Amy McCain and William R. McCain.

## INTRODUCTION

Petitioners filed this action claiming a denial of due process associated with the two day suspension of Petitioner Amy McCain from Lamar High School in Houston, Texas for possession of alcohol on school premises. Petitioners are asking this Court to examine the holding of the district court in granting a summary judgment and the holding of the court of appeals in affirming that decision. The district court converted Respondents' Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure into one for summary judgment, and granted summary judgment for Respondents where Petitioners failed to state a cause of action, and failed to produce evidentiary support for their claimed deprivation of due process.

The claimed deprivation of due process is apparently founded on the failure of Respondents to accept Petitioners' version of the facts. Petitioners also appear to claim that they were not granted a proper hearing. Petitioners admit in their complaint, however, that four separate hearings were held, each of which was sufficient to meet the requirements of *Goss v. Lopez*, 419 U.S. 565, 95

S.Ct. 729, 42 L.Ed.2d 725 (1975). Based upon the standards set forth in *Goss v. Lopez*, and Petitioners' admissions regarding the hearings held, the district court was correct in granting summary judgment and the court of appeals was correct in affirming the district court's decision. For these reasons, the Petition for Writ of Certiorari should be dismissed.

## I.

## A TYPOGRAPHICAL ERROR IN THE APPELLATE COURT DECISION DOES NOT WARRANT REVIEW BY THIS COURT

Petitioners claim that the Court of Appeals for the Fifth Circuit committed reversible error by adding the word "not" to a quote from the opinion in *Wood v. Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214, *reh'g denied*, 421 U.S. 921, 95 S.Ct. 1589, 43 L.Ed.2d 790 (1975). The court of appeals stated that, " '[p]ublic high school students do *not* have substantive and procedural rights while at school.'" *McCain v. Houston Independent School District*, No. 88-2992, slip op. at 7 (5th Cir. Oct. 18, 1989) (emphasis added), *quoting*, *Wood v. Strickland*, 420 U.S. at 326, 95 S.Ct. at 1003, 43 L.Ed.2d 214. As a result of this insertion, Petitioners claim that the Court of Appeals "declared the Bill of Rights and the Fourteenth Amendment to the Constitution of the United States to be a nullity." Petition at 26.

A review of this portion of the court of appeals' opinion clearly reveals that the court did not intend to declare the Fourteenth Amendment to be null. The court cites *Wood v. Strickland* to define "the role of the federal

courts when asked to review decisions of school administrators. . . . " *McCain v. Houston Independent School District*, No. 88-2992, slip op. at 7. The portion of *Wood v. Strickland* quoted by the court of appeals states that "[42 U.S.C.] § 1983 was not intended to be a vehicle for federal court corrections of errors in the exercise of [the discretion and judgment of school administrators and school board members] which do not rise to the level of violations of specific constitutional guarantees." *Id.; quoting, Wood v. Strickland*, 420 U.S. at 326, 95 S.Ct. at 1003, 43 L.Ed.2d 214. Clearly the court of appeals quoted *Wood v. Strickland* to establish the standard of review in school discipline cases; the accidental inclusion of the word "not" does not affect this standard, and the opinion of the court of appeals does not endanger the validity or integrity of the Fourteenth Amendment to the Constitution of the United States. Neither does this typographical error affect the citizenship rights of the McCains, or the constitutional rights of students and their parents in general. The district court properly dismissed this claim.

## II.

## THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT BASED UPON THE PLEADINGS, AFFIDAVITS AND OTHER EVIDENCE PRESENTED TO THE COURT BY THE PARTIES

Petitioners claim that both the district court and the court of appeals "invaded the province of the jury by weighing the evidence alleged in Petitioner's Complaint by arbitrarily deciding what part of the Petitioner's Complaint and supporting evidence they would choose to believe. . . . " Petition at 31. Petitioners further claim that Respondent "HISD failed to file an answer in denial in

this case, nor did they file affidavits or other evidence to refute Petitioner's evidence." Petition at 18-19.

As Petitioners correctly note, Respondents filed their Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure on June 9, 1988. In response, Petitioners filed their Memorandum in Opposition to Motion to Dismiss on June 28, 1988. Although Petitioners claim that no evidence was introduced, Petitioners admit that both parties introduced evidence by affidavit. Petition at 9. Upon reviewing the pleadings and affidavits of the parties, the district court stated that, "[s]ince both sides have treated the motion to dismiss as a motion for summary judgment, the Court will also treat the motion as one for summary judgment." *McCain v. Houston Independent School District*, No. H-88-1796, slip op. at 1 (S.D. Tex. Aug. 31, 1988), *aff'd*, No. 88-2992 (5th Cir. 1989). The district court found that the material facts were not in dispute, and based upon the pleadings and affidavits submitted by the parties, the district court granted summary judgment in favor of Respondents. *Id.* at 2.

A district court may convert a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure into one for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure where matters outside the pleadings are presented to the district court, and the district court does not exclude such evidence. *Carter v. Stanton*, 405 U.S. 669, 92 S.Ct. 1232, 31 L.Ed.2d 569 (1972). In this situation, the parties are entitled to notice of the conversion. *Isquith v. Middle South Utilities, Inc.*, 847 F.2d 186 (5th Cir.) *cert. denied*, ___ U.S. ___, 109 S.Ct. 310, ___ L.Ed.2d ___ (1988). In *Clark v. Tarrant County, Texas*, 798 F.2d 736 (5th Cir. 1986), the

court found that the parties were on notice that the motion to dismiss would be treated as a motion for summary judgment when the court accepted testimony on the issue. In the instant case, Petitioners first introduced the affidavit of Amy McCain; Respondents introduced the affidavit of Ray Reiner. Petitioners waived any claim of surprise that the motion was treated as one for summary judgment by submitting evidence in support of their allegations. Following the submission of the affidavits, Petitioners stated that Respondents were treating the Motion to Dismiss "as a *Motion for Summary Judgment* by adding an affidavit to their speaking motion." Memorandum in Opposition to Defendants' Supplement to Motion to Dismiss at 1 (emphasis in original). Clearly Petitioners were on notice of the pending summary judgment at that time, which was twenty-three days before judgment. The district court properly considered the motion to dismiss as one for summary judgment.

## III.

## RESPONDENT HOUSTON INDEPENDENT SCHOOL DISTRICT PROPERLY NOTIFIED THE PETITIONERS OF THE PROPOSED HEARINGS, AND PROPERLY HELD HEARINGS SUFFICIENT TO SATISFY THE PETITIONERS' DUE PROCESS RIGHTS.

In their Petition, Petitioners appear to claim that either the notice or the hearing did not satisfy the Petitioners' constitutional rights to due process. These due process requirements are defined in *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975). The *Goss v. Lopez* court defined minimal due process as requiring:

> in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he

> denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.

419 U.S. at 581-582, 95 S.Ct. at 740, 42 L.Ed.2d 725. In the instant case, Petitioners were afforded the degree of due process prescribed by *Goss v. Lopez*. In their Petition, Petitioners state that:

> Amy and other students were sent to the vice-principal's office where . . . they were publicly ridiculed and *accused* of possession and consumption of beer by vice-principals Burkes and Brew.
>
> Amy told them that she did not have possession of the cup and only picked it up at the direction of the coach, and, that the cup was empty except for the smell of beer.

Petition at 12-13 (emphasis added). In *Ingram v. Wright*, Justice White explained in a dissenting opinion regarding corporal punishment in the public schools that "the due process clause requires not an 'elaborate hearing' before a neutral party, but simply an 'informal give-and-take between student and disciplinarian' which gives the student 'an opportunity to explain his version of the facts.' " 430 U.S. 651, 693, 97 S.Ct. 1401, 1423, 51 L.Ed.2d 711 (1977), *quoting, Goss v. Lopez*, 419 U.S. at 580, 582, 584, 95 S.Ct. at 739, 740, 741, 42 L.Ed.2d 725. From the facts as alleged by Petitioners, Amy McCain received at least the minimal due process required by *Goss v. Lopez*.

In addition to this hearing, Petitioners Amy McCain and her father William R. McCain were provided with three further hearings wherein they were again given an explanation of the charges and an opportunity to present their side of the story. In their complaint, Petitioners

admit that on the morning of the alleged incident, Amy McCain's father William R. McCain met with Vice Principal Bart Busker to discuss the allegations. Complaint at 7.

Petitioners admit to receipt of written notice of the suspension and the bases therefor (possession of a cup of beer - lying to an administrator). *Id.* Petitioners also admit being afforded a hearing on May 29, 1987 in which Vice Principal Bart Busker affirmed the suspension of May 27, 1988, and being afforded the opportunity of appealing the decision to Principal Ray Reiner at a hearing held on June 1 and June 4, 1987, wherein the suspension was again affirmed. Complaint at 8-9. Petitioners admit being afforded a further hearing before District Superintendent Kaye Stripling wherein the suspension was affirmed once again. Complaint at 10. A further hearing was held before the Houston Independent School District Board on November 6, 1987, wherein the suspension was again affirmed. In total, Petitioners were afforded at least five separate hearings wherein they were provided with far more than the due process requirements set forth in *Goss v. Lopez.*

The degree of due process is limited by the lack of severity involved. The mandates of *Goss v. Lopez,* impose requirements:

> which are, if anything, less than a fair-minded school principal would impose upon himself in order to avoid unfair suspensions. . . . We stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to

> verify his version of the incident. Brief disciplinary suspensions are almost countless. To impose in each such case even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness. Moreover, further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process.

419 U.S. at 583, 95 S.Ct. at 740, 42 L.Ed.2d 725. It should be noted, however, that *Goss v. Lopez* speaks only to suspensions of less than ten days, such as in the case at hand. As the Court reasoned:

> requiring effective notice and informal hearing permitting the student to give his version of the events will provide a meaningful hedge against erroneous action. At least the disciplinarian will be alerted to the existence of disputes about facts and arguments about the cause and effect. . . . In any event, his discretion will be more informed and we think the risk of error very substantially reduced.

419 U.S. at 583-584, 95 S.Ct. at 741, 42 L.Ed.2d 725. These due process requirements were afforded not only once but at at least five separate hearings which all affirmed the suspension of Amy McCain. Therefore, based on Petitioners' pleadings, this Court should affirm the district court's dismissal of the allegations based on denial of due process.

## IV.

## THE DISTRICT COURT PROPERLY DISMISSED PETITIONERS' CLAIM FOR INVASION OF PRIVACY WHERE PETITIONERS FAILED TO RAISE ANY FACTUAL ALLEGATIONS SUPPORTING THEIR CLAIM

Petitioners claim that the court of appeals erred in not distinguishing Petitioners' invasion of privacy claim from their procedural due process claim. The district court dismissed the invasion of privacy claim, along with numerous other claims, on the grounds that "[Petitioners have] made no factual allegations that would support any of these causes of action." *McCain v. Houston Independent School District*, No. H-88-1796, slip op. at 2. In fact, Petitioners wholly failed to allege what action by any of the Respondents constituted an invasion of privacy. In addition to the due process and equal protection causes of action based on § 1983, § 1985(2) and (3) and § 1986, Petitioners made only conclusory allegations of violations of their right to privacy, illegal search and seizure, equal protection and right to petition. Complaint at 4.

Petitioners have failed to plead any material factual allegations which would support a claim upon which relief could be granted under these theories of recovery. These pleaded violations are conclusions, deductions and opinions, without any factual basis to support a cause of action, and therefore should be dismissed. *See e.g., Briscoe v. LaHue*, 663 F.2d 713 (7th Cir. 1981), *aff'd*, 460 U.S. 325, 103 S.Ct. 1404, 75 L.Ed.2d 96 (1983). Even a *pro se* plaintiff's complaint in a § 1983 cause of action must set forth facts which would support a cause of action; conclusory allegations unsupported by any factual assertions will not withstand a motion to dismiss. *Id.*

The only mention of any constitutional violations appears in paragraph 11 and paragraph 36 of the Complaint. In paragraph 11, Petitioners claim that:

> defendants conspired to and did under color of law, willfully and wantonly engage in invidiously discriminatory acts which were intended to and did, in fact, deprive students, their parents or representatives or others similarly situated of their constitutional rights of privacy, due process, illegal search and seizure, equal protection and right to petition for grievances.

Complaint at 4. Additionally, in paragraph 36, Petitioners contend that certain policies and procedures of Respondents deprived students and parents of their constitutional protection, including (a) right to petition, (b) right to privacy, (c) right to be secure from illegal searches and seizures, (d) right to due process, (e) right to equal protection. Complaint at 13. No facts are alleged to support these allegations.

Respondents are well aware that allegations of a complaint, particularly those of a *pro se* plaintiff are to be liberally construed. Conclusory allegations without supporting material facts are not deemed as admitted or true, however, and cannot support a cause of action challenged by a motion to dismiss. *See, Albany Welfare Rights Organization Day Care Center, Inc. v. Schreck*, 463 F.2d 620 (2nd Cir. 1972), *cert. denied*, 410 U.S. 944, 93 S.Ct. 1393, 35 L.Ed.2d 611 (1973) (conclusory allegations could not be presumed as true without supporting material facts). The district court properly dismissed Petitioners' assertions of violations of right to petition, illegal search and seizure,

equal protection violations and violations of right to privacy absent any factual allegations to support these claims.

The court of appeals correctly noted that dismissal on these grounds was entirely proper. *McCain v. Houston Independent School District*, No. 88-2992, slip op. at 5; *citing, Brinkmann v. Johnston*, 793 F.2d 111 (5th Cir. 1986); *Briscoe v. LaHue*, 663 F.2d 713 (7th Cir. 1981). The court of appeals further noted that these claims were appropriate for dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *McCain v. Houston Independent School District*, No. 88-2992, slip op. at 6, *citing, Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

## V.

## THE DISTRICT COURT PROPERLY DISMISSED PETITIONERS' CLAIMS UNDER 42 U.S.C. § 1983

Petitioners claim that Respondents have admitted violating Petitioners' right to petition the school board for relief. Petitior at 34. No factual statement accompanied this allegation in Petitioners' Complaint. Petitioners cite a portion of the Texas Education Code, which provides in part:

> (f) A student's parent or guardian is entitled to notice as soon as reasonably possible of a suspension or removal of a student to an alternative education program and an opportunity to participate in a proceeding under this section.

Tex. Educ. Code § 21.301(f) (Vernon's 1987). This Section of the Texas Education Code relates to suspensions of six days or more. *Id.* The suspension at issue in this case was for only two days, thus this Section does not apply.

In any event, Petitioners state that Amy McCain's father William R. McCain met with Vice-Principal Busker "[l]ater that morning. . . . " Petition at 14. Nowhere in the Complaint or the Petition do Petitioners allege that they were not allowed to participate in any subsequent proceeding on this matter. Absent any factual allegations to support these allegations, the district court properly dismissed this claim.

## VI.

## MINOR AMERICAN STUDENTS ARE NOT A PROTECTED CLASS UNDER 42 U.S.C. § 1985(2) AND (3)

Petitioners claim that minor American students constitute a protected class under 42 U.S.C. § 1985 (2) and (3) as a result of past discrimination against children in the United States. Petition at 34. Protected class status is an essential element to a cause of action under 42 U.S.C. § 1985. *Griffin v. Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971); *United Brotherhood of Carpenters and Joiners of America, Local 610, AFL-CIO v. Scott*, 463 U.S. 825, 103 S.Ct. 3352, 77 L.Ed.2d 1049 (1983). The proposed class of all minor American students does not satisfy the requirements of a class for purposes of 42 U.S.C. § 1985.

In order to qualify a claim under 42 U.S.C. § 1985, a plaintiff must show that the defendant intended to discriminate against the plaintiff based on the plaintiff's race or class. *Griffin v. Breckenridge*, 403 U.S. at 102, 91 S.Ct. at 1798, 29 L.Ed.2d 338 ("there must be some racial or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." (Citation omitted)). Petitioners make no factual allegations to support

their claim that Respondents conspired to discriminate against minor students. The basis of Petitioners' claim is only the action against Petitioner Amy McCain. Petitioners make no allegation nor state any fact to support a claim that Respondents discriminated against other students. A single incident against one member of the proposed class does not reach the level of class based discrimination.

In support of their claim that 42 U.S.C. 1985 (2) and (3) apply, Petitioners cite *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). *Gault* was not brought under 42 U.S.C. § 1985, but as a claim under the Fourteenth Amendment to the United States Constitution, claiming a denial of due process. Neither is *Gault* reflective of the degree of due process warranted in the instant case. The *Gault* court held that a 15 year old boy and his parents were entitled to more due process than they had received where the 15 year old defendant had been sentenced to six years in a juvenile home for making a lewd telephone call. The holding of the *Gault* court has no bearing upon and does not support Petitioners' claim that minor American students are a protected class.

## VII.

## RESPONDENTS ACTED PROPERLY AND WITHIN ALL APPROPRIATE RULES IN SUSPENDING PETITIONER

For the first time on appeal, Petitioners allege that Respondents failed to follow the proper procedure relating to a long term suspension or an expulsion. Petitioners failed to assert facts in their Complaint to support this

allegation. Thus the district court acted properly in dismissing this claim.

## CONCLUSION

Petitioners essentially contend that they are not satisfied with the hearings held on the issue of Amy McCain's two day suspension, primarily the failure of others to believe her version of the incident. Petitioners do not deny that numerous hearings were held, that Petitioners were informed of the charges against Amy McCain or that Petitioners were allowed to relate their version of the facts. Based only upon the Petitioners' Complaint, Petitioners have failed to state a cause of action for which relief could be given.

Similarly, Petitioners' claims of denial of a right to privacy and discrimination are not supported by any facts or authority. Based upon the mere conclusory statements of Petitioners, the district court acted within its direction in dismissing these claims. For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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